IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

FAO.No. 301 of 2007()

AS.18/2007 of ADDL. DISTRICT COURT, PARAVUR
OS.731/1999 of MUNSIFF COURT,ALUVA

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APPELLANT/IST RESPONDENT/PLAINTIFF

PHILIP, AGED 41 YEARS,
S/O. MALIYEKKAL VEETTIL OUSEPH, ANGAMALY KARA,
KOTHAKULANGARA SOUTH VILLAGE, ANGAMALLY VILLAGE
ALUVA TALUK.

BY ADV. SRI.PAUL K.VARGHESE
SRI.ANJALI.N.

RESPONDENTS: APPELLANT/RESPONDENT NOS. 2 & 3 DEFENDANTS

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1. RAJAGOPALAN,AGED 60 YEARS,
S/O. LEKSHMI VILASATHIL AYYAPPAN NAIR
RESIDING AT STAFF QUARTER, STANDARD POTTERY WORKS
CHOORNIKKARA, ALUVA WEST VILLAGE, ALUVA TALUK.

2. VIJAYA LEKSHMI,AGED 56,W/O.RAJAGOPALAN
LEKSHMI VILASATHIL RESIDING AT STAFF QUARTERS,
STANDARD POTTERY WORKS CHOORNIKKARA,
ALUVA WEST VILLAGE, ALUVA TALUK.

3. THASNA,D/O. ABDYL HAKIM,AGED ABOUT 13
C.P.NO. 8/434,THAIKKATTUKARA P.O.
ALUVA, REP BY HER FATHER ABDUL HAKIM
AGED 51, S/O. KANI RAWTHER,
C.P.NO.8/434,THAIKKATTUKARA P.O.
ALUVA.

BY

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 15/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.No.3784/2007 IN FAO No.301/2007

15.10.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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F.A.O. NO.301 OF 2007

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Dated this the 15th day of October, 2007

JUDGMENT

This appeal is filed against the order of remand passed by Additional District Judge, North Paravur in A.S.18/2007. That appeal was filed by a third party, challenging the ex parte decree granted in favour of the appellant in O.S.731/1999 before Munsiff Court, Aluva. That suit was filed against respondents 1 and 2 herein seeking a decree for declaration of recovery of possession and consequential injunction contending that Rs.80,000/-was advanced by appellant to first respondent for the purpose of purchasing a property and first respondent purchased the property utilising the money so advanced and at the time of advancing the money there was an agreement to convey five cents of property within six months in favour of appellant and though first respondent did not assign the property, later as per sale deed

584/1996 the property was assigned to the appellant and he constructed a building therein and is residing therein and while so on 21.5.1998 respondents 1 and 2 the defendants in suit trespassed into the property and forcibly took possession of the property and therefore he is entitled to a decree for recovery of possession. Defendants though filed a written statement disputing the claim, they did not participate in the trial. Learned Munsiff therefore did not consider the defence raised at all. Accepting the evidence of the appellant trial court granted the decree. Appellant in the first appeal is an assignee of the second respondent to whom second respondent sold the right obtained from first respondent. First appellate court on the materials found that an opportunity is to be granted to the appellant who is the third respondent in this appeal as trial court did not consider the suit on merit. It is for that reason decree was set aside and suit was remanded. It is challenged in the

appeal.

2. Learned counsel appearing for appellant was heard.

3. The argument of learned counsel is that when appellant filed execution petition for execution of the decree obtained in O.S.731/1999, third respondent filed a claim petition, which was dismissed by executing court after recording evidence and challenging that order an appeal was filed by third respondent before the very same appellate Court and as the case set up by third respondent herein was considered in the claim petition, there was no necessity to remand the case back to the trial court and therefore the judgment of the first appellate court is to be set aside. Learned counsel argued that learned Additional District Judge had in fact heard the appeal filed against the dismissal of the claim petition together with this appeal but did not pronounce the judgment in the other appeal and in such circumstance the order of remand is to be set

aside.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

5. If the decision in the claim petition preferred by third respondent had become final, case of appellant could have been accepted. But when the correctness of the decision of the executing court dismissing the claim petition filed by third respondent is pending before Additional District Court, North Paravur, in the appeal filed by third respondent claimant, it cannot be said that claim of third respondent will not arise for consideration or is barred by res judicata. First appellate court found that when the impugned decree was granted without considering the objections raised by defendants in their written statement, as defendants were ex parte and third respondent is the assignee, an opportunity is to be granted. It cannot be termed illegal or incorrect. Hence no substantial question of law is involved in

this appeal.

Appeal is dismissed. Trial court is to dispose the suit as expeditiously as possible.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006